IN THE

Supreme Court of the United States

October Term, 1945.

No. 57.

COURTNEY M. MABEE, CHARLES K. BARNUM, EDWARD G. TOMPKINS, NORTON MOCKBRIDGE, GEORGE S. TROW and WILLIAM L. O'DONOVAN,

Petitioners,

AGAINST

WHITE PLAINS PUBLISHING COMPANY, INC.,

Respondent.

ON CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

BRIEF FOR THE PETITIONERS.

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Opinions.

The opinion of the Trial Court (R.* pp. 88 to 95), Supreme Court, Westchester County, is reported at 180 Misc. 8; 41 N. Y. S. 2d 534.

The opinion on the motion to dismiss the complaint is reported at 179 Misc. 832; 37 N. Y. S. 2d 231.

*R. refers to record in this Court.

The opinion of the Appellate Division of the Supreme Court (R. 97 to 103) is reported at 267 A. D. 284; 45 N. Y. S. 2d 479.

There was no opinion in the Court of Appeals except a memorandum reported at 293 N. Y. 781 and the judgment of the Court of Appeals affirming the reversal is at R. 103-104.

The order of the Court of Appeals amending the remittitur appears at R. 105, and is reported at 294 N. Y. 701.

Jurisdiction.

The jurisdiction of this Court was invoked under Section 237 (b) of the Judicial Code, as amended, by the Act of February 13th, 1925, and this Court granted certiorari on May 21st, 1945 (89 Law Ed. 1157) (R., p. 106).

Questions Presented.

1. The Appellate Division below has stated that question as follows (R. 98):

> "The principal question presented is: Does the Act apply to appellant, and were its employees—respondents herein—engaged 'in any process or occupation necessary to the production' of goods in interstate commerce within the meaning of section 3 (j) of the Act?"*

2. There was also present the question as to whether the respondent, viz., the newspaper was engaged in the production of goods for interstate commerce under the Act.

3. Whether the respondent's out-of-state circulation was so small as to preclude coverage under the doctrine

*Fair Labor Standards Act hereinafter referred to as the "Act".

"de minimis non curat lex" and is that doctrine applicable to cases arising under the Act.

Statute Involved.

The pertinent provisions of the Fair Labor Standards Act of 1938 are set forth in the Appendix A, *infra* (pp. 43 to 45). (52 Stat. 1060, 29 U. S. C. Sec. 201, *et seq.* Public—No. 718—75th Cong.; Chap. 676—3rd Session.)

Statement.

The petitioners were employees of the respondent. The respondent was engaged in publishing a daily news paper at White Plains, New York. The petitioners were engaged in the process of obtaining, receiving and soliciting news, rewriting, editing and preparing the material for publication and obtaining news and advertising from various sources and preparing that for publication.

The Trial Court held: (R. 89):

> "Evidence upon the trial established that each of the plaintiffs was employed in producing and working on such goods in a process and occupation necessary to the production thereof (F. L. S. A. of 1938, sec. 3 [j]; Interpretive Bulletin No. 1 [5])."

The petitioners brought an action in the New York Supreme Court, Westchester County, for overtime compensation under Section 7 of the Act.

The respondent first moved in the New York Supreme Court to dismiss the complaint claiming the facts therein failed to constitute a cause of action or specifically for the reason that the respondent was not engaged in interstate commerce. The Justice presiding at Special Term, who heard this motion, denied the same. His opinion is reported at 179 Misc. 832 (38 N. Y. S. 2d 231).

The parties stipulated to try the case without a jury and it was tried at a Trial Term of the Supreme Court, Westchester County, and an award of $42,010.34 was granted to petitioners by the Trial Judge.

The respondent appealed to the Appellate Division of the New York Supreme Court from such judgment and the Appellate Division reversed the judgment of the Trial Court on the law and on the facts and dismissed the complaint on the law.

The petitioners then appealed to the New York Court of Appeals which affirmed the decision of the Appellate Division without opinion.

The petitioners thereafter moved in the Court of Appeals for an amendment of the remittitur so as to state the federal question involved and, on March 9th, 1945, the Court of Appeals granted such motion (R. 105) (294 N. Y. 701) and amended the remittitur as follows (R. 105):

> "Motion to amend remittitur granted. Return of remittitur requested and when returned it will be amended by adding thereto the following: Upon this appeal there was presented and necessarily passed upon the question whether the respondent was engaged in interstate commerce or in the production of goods for interstate commerce within the meaning of the Fair Labor Standards Act of 1938. This court held that the respondent was not engaged in interstate commerce or in the production of goods for interstate commerce within the meaning of the Fair Labor Standards Act of 1938."

Summary of Facts.

The respondent published its paper at White Plains, New York, a city of about 40,000 (1940 U. S. Census). The respondent was a member of the Associated Press

and International News Service receiving daily from them national and international reports from all over the world (R. 30, 32, 38, 50, 51, 54, 66, 67, 73, 85).

The respondent, by its link to the Associated Press and the International News Service's national wide networks, was served by the same wireless, cable and other means of communication that are used by the Press Services in receiving and transmitting news and intelligence. Thus, respondent's operations involved "the constant *use* of channels of interstate and foreign communications" (*Associated Press* v. *N. L. R. B.*, 301 U. S. at 128).

Not only was the respondent engaged in interstate commerce through the *receipt* of news over the national and international networks of Associated Press and International News Service wires, but it was also engaged in the *reverse process* of sending news via the same wires which it had collected locally, under its contract with the news agencies. This is evidenced by Paragraph Fourth of the respondent's contract with the International News Service (Exhibit 15, R. 85), which is as follows:

> "FOURTH: The Publisher agrees to furnish to International News Service at the office of the Publisher for publication and/or distribution all local news and special service from tributary news territory collected by the Publisher, without cost to International News Service."

This in effect constituted the respondent as the agent to gather news originating in their territory and furnish it to the International News Service for distribution throughout the country.

Furthermore, this Court may take judicial notice of the factual nature of the few press agencies existing in this country as found in *Associated Press* v. *N. L. R. B.*, 301 U. S. 103, where the Court held that the Associated

Press was engaged in interstate commerce and if the Association was so engaged then each member or part thereof should likewise be engaged in interstate commerce.

The respondent had leased wire printers or teletypes (R. 50, 51).

The teletype machines over which the International news and Associated news dispatches came were operated daily from morning to night (R., p. 51). News items were sometime taken off the teletype machines and printed without change (R., p. 71).

Respondent had national advertising in the same proportion as any other daily newspaper of its size (R., p. 57).

Its advertising mats were secured from a national advertising agency in Chicago, Illinois (R., p. 30). Its cuts to reproduce pictures came from Philadelphia, Pa. (R., pp. 30, 37, 57, 58).

Comic strips, syndicated news, medical news columns and panels came from Chicago and California (R., p. 31).

The pictorial service of the Central Press Association of Chicago, Illinois was used by the respondent (R., p. 31).

The paper which the respondent used to produce its newspaper came from Maine (R., p. 35).

Some of the petitioners at times traveled from the State of New York to places in Connecticut and New Jersey where they sold advertising space in the newspaper (R., p. 34).

Some of the petitioners traveled from New York to South Norwalk and Greenwich, Connecticut to cover events which were reported in the newspaper when printed (R., p. 48).

The petitioners also proved that the respondent was likewise engaged in interstate commerce since they shipped in interstate commerce to prepaid subscribers outside of the State of New York about 45 papers each day of each week of each year. The yearly circulation for this pur-

pose was over 14,000 copies per year which was a regular, daily, continuous practice.

Summary of Argument.

1. The respondent* was engaged in interstate commerce and in the production of goods for interstate commerce because:

(a) It published a daily newspaper in the City of White Plains, New York, every edition of which was composed in part of news received over the International News Service of the Associated Press and International News Service, photographs, cuts, advertising matter, mats containing syndicated articles and similar matter regularly received from out of state sources.

(b) In reverse, it gathered local news in and about the City of White Plains, New York and sent and transmitted the same over the International Network of International News Service and Associated Press; and

(c) Actually distributed a portion of its product every day to at least 45 paid subscribers located out of the State of New York.

(d) The theory that under the receiving aspect of this case there was such a pause between the receipt of interstate and international news and its transmission to the subscribers of the paper as to break the continuity of transit to such an extent as to have the interstate journey come to an end, is not applicable to a daily newspaper. A daily newspaper can only survive and compete with

*If the respondent is held so engaged, then each employee that engaged in that process or in the production of goods for such commerce, is so engaged. *Kirschbaum* v. *Walling*, 316 U. S. 517 (R., pp. 89-90). Evidence upon the trial established that each of the plaintiffs was employed in producing and working on such goods in a process and occupation necessary to the production thereof (F. L. S. A. of 1938, Sec. 3 [j]; Interpretive Bulletin No. 1 [5]).

other forms of news agencies if its news and material is transmitted to the reading public as fast as modern science permits. Concededly this national and international news was transmitted to the subscribers as fast as possible and in many instances where the importance of the news warranted it, special editions were gotten out.

2. It was conceded that the shipping of a portion of the newspapers published to out of state points was an engagement in interstate commerce, but the Appellate Courts below erroneously ruled that such portion was too small and insignificant to be considered in determining coverage on the doctrine of "*de minimis non curat lex.*" The State Courts erroneously justified the application of this doctrine on the decision of this Court in *National Labor Relations Board* v. *Feinblatt*, 306 U. S. 601.

The National Labor Relations Act was intended to cover acts or transactions that *materially* affected the flow of raw materials, etc. or *substantially* impaired or disrupted the market for goods flowing from or into the channels of commerce.

Of course, under the phraseology of that act, the *de minimis* theory might apply but since no such words are used in the act now under consideration the *de minimis* theory can have no application and it is obvious, from the legislative intent and the decisions of the Federal Courts, that the act was intended to apply wherever the employee was engaged in interstate commerce without reference as to the magnitude or the extent to which such interstate commerce was present.

3. Assuming, but not conceding that under some circumstances the "*de minimis*" doctrine might be applicable, it clearly could not apply to any case such as the case at bar where the out of State activities were a daily, regular, continuous every day, every week and every

month practice and was not casual, spasmodic, isolated, rare or occasional. The two district court cases in the Federal Courts relied upon by the Appellate Division were not newspaper cases and were never considered authoritative or approved by this Court and are clearly distinguishable and contrary to the overwhelming weight of authority in the Federal Courts.

ARGUMENT.

POINT I.

The business of receiving, transmitting, exchanging news, intelligence and advertising through the use of interstate communications and agencies constitutes interstate commerce and the producing therefrom a product (a daily newspaper) constitutes producing goods for interstate commerce within the meaning of the Fair Labor Standards Act of 1938

The Act applies to all employees engaged in commerce or in the production of goods for commerce and provides:

> "Sec. 3. As used in this Act
>
> • • •
>
> (b) 'Commerce' means trade, commerce, transportation, transmission, or communication among the several States or from any State to any place outside thereof.
>
> • • •
>
> (i) 'Goods' means goods (including ships and marine equipment), wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof,

but does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof.

(j) 'Produced' means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof, in any State."

Under the facts that we have related the respondent was engaged, among other things, in "communication" among the several states since by their membership in the news associations, they were constantly communicating and exchanging news items through the country.

Since under the Act "Goods" includes "subjects of commerce of any character" as well as "wares", "products", "commodities" and "merchandise", it is idle to argue that a newspaper is not an article of commerce.

Under the term "Produced" as used in the Act, the respondent was engaged in the production of "goods" since a newspaper is obviously as much of a "product" as a book.

Whenever a case of a newspaper receiving, exchanging news and producing a daily paper therefrom as the respondent did in this case was presented to any of the Federal Courts, they were unanimous in holding coverage under the Act. In *Sun Publishing Company* v. *Walling*, 140 Fed. 2d 445, certiorari denied 322 U. S. 728 (CCA--6) Simons, *C. J.*, in holding the employees of The Jackson Sun, a newspaper with approximately the same circula-

tion as that of the respondent, covered by the Act, observed (p. 445):

> "The appellant publishes The Jackson (Tenn.) Sun, a newspaper with a circulation of 9,000 daily and 11,000 on Sunday. Approximately 200 copies of each edition are sold outside of the state. An added number of copies are sent extrastate as complimentary or to national advertisers for confirmation of their advertisements. The newspaper is a member of the Associated Press and not only receives news from it but transmits to it news items originating in its own territory. It also receives news from the United Press Association, receives from out of the state the comic supplement which it distributes with its Sunday edition to both local and outside subscribers, and uses syndicated articles sent to it by mail from various national services. It carries a substantial volume of national advertising for out-of-state producers and distributors who usually send it their mats or electrotype plates for printing. Substantially all of its paper and other materials are shipped to it from outside the state. Its employees include the writers and reporters who gather, compose and edit the news stories and write headlines, the linotypers and stereotypers, pressmen, subscription and circulation employees, and the like."
>
> • • •
>
> "The contention that the Act is not applicable to the appellant's business because its employees are not engaged in commerce or the production of goods for commerce, must be rejected on the authority, among others, of *Associated Press* v. *N. L. R. B.*, *supra*."

The newspaper in the *Sun Publishing Co.* case in their petition to this Court for certiorari not only raised the question that the newspaper was not engaged in interstate commerce but referred to the instant case as one of its authorities for that proposition (Petition for Writ of Certiorari, p. 24) and claimed that that decision conflicted with the holding in *Schroepfer* v. *A. S. Abell Co.*, 138 Fed. 2d 111, certiorari denied 321 U. S. 763.

The *Schroepfer* case was relied upon by the Appellate Courts of New York in denying coverage in the instant case. An examination of the opinion in that case clearly discloses that it is not authority for the negation of coverage under the Act. On the contrary, the Court (Parker, *C. J.*) recognized that the newspaper was engaged in interstate commerce when he said at page 113

> "There is no question but that the defendant is engaged in interstate commerce with respect to the publication of its papers, the gathering of news therefor and the sale of the portion of its papers sent out of the state. *N. L. R. B.* v. *A. S. Abell Co.*, 4 Cir., 97 F. 2d 951, 954 (2 LRR Man. 679)."

And, no doubt had the question in the *Schroepfer* case arisen between the newspaper and its employees, the Court would have held that the latter were under the coverage of the Act but the learned Circuit Court Judge in that case thought that after the paper had been sold to distributors (rackmen) who sold and distributed without any supervision or control by the newspaper, these rackmen were not employees of the newspaper, but independent contractors and, therefore, not covered by the Act.

There are other case where the Federal Courts have considered the coverage under facts strikingly similar to the case at bar. In each instance that Act was held to apply.

In *Fleming* v. *Lowell Sun Company*, 36 Fed. Supp. 320, D. C. Mass., reversed on other grounds 120 Fed. 2d 213, and affirmed by an equally divided Court, 315 U. S. 784, 1 WHC 418, the Court said at page 326 (Ford, *D. J.*):

> "It is common knowledge that the instrumentalities of interstate commerce are used and affected by every newspaper in gathering and publishing news and preparing the newspaper for circulation both in and out of the State in which it is published. This point has been raised time and time again, and it is too late in this case, under the doctrine laid down by the recent cases of *Associated Press* v. *National Labor Relations Board*, 301 U. S. 103 (1 LRR Man. 732), and *National Labor Relations Board* v. *A. S. Abell Co.*, 97 F. 2d 951 (2 LRR Man. 679), and cases cited, to raise it successfully now. Cf. *Gibbons* v. *Ogden*, 9 Wheat. 1, 6 L. Ed. 23; *National Labor Relations Board* v. *Fainblatt*, 306 U. S. 601 (4 LRR Man. 535), where the Court said: 'The power of Congress to regulate interstate commerce is plenary and extends to all such commerce be it great or small'."

In *Walling* v. *Oklahoma Press Publishing Company*, U. S. D. C. E. D. Oklahoma, June 12th, 1944, 7 WHR* 655, the District Judge, in holding a local newspaper under the Act, stated:

> "The Company receives its news in the usual manner. Out-of-state news is received over telegraphic wires by means of an automatic teletype machine which requires no one to operate. The Company then selects that part of such news as is desired and publishes it, discarding the remainder.

*Wage and Hour Reporter.

> Its out-of-state ads are received through the United States mail, a large part thereof being in the form of mats with electrotype plates. The Company deals with an out-of-state representative in handling this out-of-state advertising. The advertisers pay an out-of-state representative, and the out-of-state representative in turn pays the Company, after deducting his commission. At the hearing, the Company admitted that much of its newspaper supplies; paper, machinery, etc., are purchased outside the State of Oklahoma."

Belo v. *Street*, 36 Fed. Supp. 907, affd. 121 Fed. 2d 207, affd. 316 U. S. 624, Feb. 4, 1941, D. C. N. D. Texas, Atwell, *D. J.*, stated:

> "Of course, the news is engaged in interstate commerce. It sends its papers everyfhere. It receives supplies and news from abroad."

The first two Judges who heard this case at Trial Term were of the same views:

Mr. Justice Witschief, at Special Term, 179 Misc. 832; 38 N. Y. S. 2d 231:

> "All of the objections made to the Fair Labor Standards Act of 1938 in regard to its application to the defendant have been overruled in the U. S. District Court for the District of Massachusetts, in *Fleming, Adm'r, etc.* v. *Lowell Sun Co.*, 36 F. Supp. 320. The Federal Courts have held that newspapers are subject to the Fair Labor Standards Act of 1938. *A. H. Belo Corporation* v. *Street*, D. C., 36 F. Supp. 907. And the U. S. Supreme Court has held that the Associated Press is engaged in interstate commerce. *Associated Press* v. *National Labor Relations Board*, 301 U. S. 103, 57 S. Ct. 650,

81 L. Ed. 953. That Congress considered the act as applicable to daily newspapers is indicated by the eighth exemption in Section 13 of the act which excludes weekly or semi-weekly newspapers with a circulation of less than 3,000, the major part of which is in the county where the publication is issued. It is not for this court to consider either the wisdom or the justice of the application of the act to daily newspapers in such localities as White Plains, only a very small portion of whose circulation goes without the state."

Opinion of Trial Judge (R. 89):

"Prior to the trial the defendant had moved before Mr. Justice Witschief to dismiss the complaint. The questions raised upon that motion were decided in accordance with the statute and authoritative precedents. The court at this time reaffirms the decision of Mr. Justice Witschief (179 Misc. 832, 38 N. Y. S. 2d 231) to the full extent thereof."

The Appellate Division below (R. 101) observed that the respondent purchased its supplies, mats and other features and received reports of the Associated Press from outside of the State of New York and on the authority of the *Schroepfer* case stated (R., p. 101):

"It is inconceivable, at least to us, that because appellant purchased, outside New York, materials used in the production of its newspaper, that it is subject to the Act. Obviously, when these supplies were delivered to appellant's plant they arrived at their destination and their interstate movement ended."

What the Appellate Court overlooked was that the interstate journey of the news, advertising matter, reproduced photographs, cuts, etc. did not end upon their receipt by the newspaper but they were, as fast as modern science would permit it, passed on to the ultimate consumer—the reader.

As this Court stated in *Walling* v. *Jacksonville Paper Company,* 317 U. S. 564, 568, a temporary pause in their transit does not mean that they are no longer "in commerce" within the meaning of the Act. Furthermore, as this Court noted in the same case, the receiving of merchandise from out-of-state sources without shipping the same across state lines did not destroy the interstate character of the transaction and that (p. 566):

> "Employees who are engaged in the procurement or receipt of goods from other states are 'engaged in commerce' within the meaning of the Act."

Very recently (September 28th, 1945) the United States District Court, N. D. Iowa, after an exhaustive review of the authorities, came to the same conclusion in a case involving the distribution of petroleum. *Keen* v. *Mid-Continent Petroleum Corporation,* No. 131, 8 WHR 1029.

What the Appellate Division below also overlooked was that the respondent was engaged in the process of gathering and sending news, gathering news in its locality to be sent throughout the country and publishing news received via press wires from all over the country. This gathering and exchanging and publishing of news constituted engaging in interstate commerce under the Act regardless of the area of the paper's circulation. If the respondent omitted to publish its daily paper but merely was one of the link in the gathering and exchanging of news for the press services under its contract (Exhibit 15), it would

still be engaged in interstate commerce within the meaning of the Act so that the number of papers actually distributed outside the State is entirely immaterial. (See Points II and III.)

The Appellate Division in reviewing the theory of coverage in this case, based its decision upon dicta contained in the voluminous opinion of Judge Parker in the *Schroepfer* case and failed to cite any Federal case in which the *decision* supported this view. At page 102 of the Record, the Appellate Division states:

> "No do we believe that when appellant (fol. 555) obtained news reports and other matter from sources outside New York and edited and reproduced some of them in its newspaper, that it became subject to the Act. As stated by Judge Parked in the case last cited [*Schroepfer* case]: 'In the case at bar, there can be no question but that the interstate movement of materials used in the publication of the papers, including news reports and other matter published, ended when they were delivered to defendant. Defendant used them as it saw fit in producing its papers and did not pass them on to its customers, as a telegraph company or a news service might have done. What occurred, therefore, was not mere "milling in transit" but the production of an entirely new article of commerce in which the news received interstate was merely one of the ingredients.' The transmission of extra state news by appellant to its readers did not involve that 'practical continuity of movement" of which the court spoke in *Walling* v. *Jacksonville Paper Co.* (*supra*). If respondents' reasoning be adopted, then, as stated by Mr. Justice McReynolds in his dissenting opinion in the *Fainblatt* case (*supra*): 'the power to regulate inter-

> state commerce brings within the ambit of federal control most* if not all activities of the nation; * * *'. For instance, a baker in Brooklyn, who purchases his flour from a concern in Minnesota and whose sales are limited to his local neighborhood, would be engaged in interstate commerce and subject to the Act if, at a customer's request, each week he sent a box of cookies to the latter's son at (fol. 556) the training station in Pensacola, Florida. Of course, no such result was intended by Congress."

As this Court held in the *Walling* case, which involved the transportation of paper and supplies pursuant to regular orders, involved a "practical continuity of movement", then surely this Court should hold that the transmission of news from the International news wires to a daily newspaper must necessarily involve a much greater "practical continuity of movement" because news, to constitute news, must follow the happening of the event with the greatest possible rapidity.

The Appellate Division overlooked the fact that the respondents did, as far as modern science would enable them, deliver the news report to the reader and many times in the same identical language in which it was received. Furthermore, there was a constant stream of advertising cuts, reproduced photographs and syndicated columns which were to reach the reader as speedily as possible.

Furthermore, the illustration by the Appellate Division of the baker's case (*Goldberg* v. *Worman*, 37 Fed. 2d 778 D. C. Florida) is not a comparable one. A baker does not receive his flour and materials through some sort of teletype machine or is he a member of an asso-

*Jackson, J., in *U. S.* v. *Underwriters Association* (322 U. S. 533) at p. 586:

> "I have little doubt that if the present trend continues federal regulation eventually will supersede that of the states."

ciation that exchanges or transmits news interstate, and it is common knowledge that a baker would buy his flour and other materials in large quantities which would go into storage and a large part of each shipment might not reach the ultimate consumer for months to come. As we point out *infra* (p. 38), this case is an isolated one and not considered authoritative and contrary to the overwhelming weight of authority in the Federal Courts.

The Appellate Division's conclusion (p. 99) where it held:

> "The conclusion is irresistible that appellant was engaged in a strictly local as distinguished from a national activity *i. e.*, the local business of publishing a local newspaper."

is of no importance, because this Court has expressly held that

> "The fact that all of respondent's business is not shown to have an interstate character is not important" (*Walling* v. *Jacksonville Paper Co.*, 317 U. S. 571).

Likewise, it was equally unimportant that the Appellate Division called the respondent "a strictly local enterprise" (R., 101).

The fact that some of its business or even most of its business was local is immaterial, provided it has shown, as in this case, that at least some of its business is interstate.

The review of the character of the activities of local daily newspapers throughout the country by the Wage and Hour Administrator (Deft.'s Exh. A) coincide with our contention.

This report says (p. 66):

> "While the point of view and circulation of the small paper are essentially local, the typical small

paper has sufficient interstate connections and depends to so large an extent upon the channels of interstate commerce and communication that any picturization of it as a 'strictly local enterprise' is misleading.''

To summarize; the record demonstrated that the respondent was engaged in interstate commerce because:

1. It produced a product, a newspaper, which it shipped in interstate commerce;

2. It received news matter, material, cuts, and supplies, etc., from interstate sources which went into its product;

3. As a member of interstate news agencies, it was constantly receiving and obligated to send and exchange news items from and to all parts of the country across state lines.

The respondent's business was an engagement in interstate commerce and the production of goods for interstate commerce within the meaning of the Act and the Trial Court was correct in holding that each of the petitioners engaged in that process or in the production of goods for such commerce was so engaged (*Kirschbaum* v. *Walling*, 316 U. S. 517).

The Appellate Courts below were in error in disturbing the judgment of the Trial Court.

POINT II.

There is no expression in this court in a case under the Fair Labor Standards Act which justified the courts below in applying the "de minimis" doctrine. On the contrary, this court has said in effect otherwise.

The point now under consideration will be discussed under the following sub-heads:

(1) The Appellate Division under the *National Labor Relations Board* against *Fainblatt*, 306 U. S. 301, applied the *de minimus* doctrine to the facts in the instant case. This they were not justified in doing because that case was under another Federal statute and this Court in cases arising under the Act have in effect said otherwise.

(2) The Legislative history of the Act clearly shows that the *de minimus* doctrine is wholly inapplicable.

(3) The Wage and Hour Administrator in his investigations and administration under the Act has found the *de minimus* doctrine inapplicable.

(1)

The Appellate Division in applying the *de minimus* theory relied primarily upon the decision of this Court in *National Labor Relations Board* against *Fainblatt*, 306 U. S. 301.

In the findings and declaration of policy of the *National Labor Relations Act* (Title 29, Sec. 151 U. S. C. A.) (49 Stat. 449), Sec. 1, Congress used the phrase:

> "* * * *materially affecting*, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods

> in commerce; or (d) causing diminution of employment and wages in such volume as *substantially* to impair or disrupt the market for goods flowing from or into the channels of commerce." (Italics ours.)

No such words as "materially affecting" or "substantially" were used in the Fair Labor Act.

The "critical words" of the National Labor Relations Act are "affecting commerce" (*Santa Cruz Fruit Pack. Co.* v. *National Labor Relations Board*, 303 U. S. 453, 467).

It is therefore clear that the application of the *de minimis* theory in construing the National Labor Relations Board Act can have no application whatever to the Fair Labor Act where the materiality or the substantiality of the services performed is not recognized and does not form a test as to the applicability of the Act. This Act was intended to remedy substandard conditions wherever found without reference to the materiality or substantiality, which those conditions bore to interstate commerce. This is in line with the opinion of Mr. Justice Frankfurter, who so aptly stated in *Federal Trade Commission* v. *Bunte*, 312 U. S. 349, 353:

> "Translation of an implication drawn from the special aspects of one statute to a totally different statute is treacherous business."

Furthermore, this Court in the *Fainblatt* case recognized that volume was never to be a criterion unless there was some express provision in the Act making it so or in the Act by implication, a circumstance not present in the Fair Labor Act.

An example of an express provision which this Court must have had in mind is Section 203 (b) 9 of the Motor Carrier Act of 1935 which was enacted by almost the same Congress that enacted the Fair Labor Standards Act:

> "* * * the casual, occasional or reciprocal transportation of passengers or property by motor vehicle in interstate or foreign commerce for compensation by any person not engaged in transportation by motor vehicle as a regular occupation or business * * * are exempt" (from Motor Carrier Act).

Likewise, in the Social Security Act 52 Stat. 1110, 42 U. S. C. A. Sec. 1107, wherein employers employing eight or less persons each of some twenty days during the taxable year were exempt from the Act. There, of course, are other examples under federal statutes.

The only express provision in the Act as to volume is in the exemption of Section 13, Subdivision 8. This Subdivision exempts from the coverage of the Act any employee of a weekly or semi-weekly newspaper "with a circulation of less than 3,000, the major part of which circulation is within the county where printed and published."

Further exemptions appear in the Act for certain employees of a "retail" or "service" establishment "the greater part" of whose time in intrastate commerce (13 a-2 of Act) and public telephone exchanges have then less than a stated number of stations (13 a-11). An express or implied provision exempting *daily* newspapers was not inserted by Congress in the Act.

The exemptions to the Act were carefully worked out and were the subject of considerable debate* by Congress. Congress well knew that most daily newspapers would necessarily have a small percentage of circulation beyond the place of publication. With this in mind they selected the special type of newspaper to be exempted and thereby included all others that utilized in any respect the channels of interstate commerce. As the Wage and Hour Administrator significantly pointed out in his Interpretative

*Law & Contemporary Problems, Vol. VI, No. 3, Summer 1939, pages 483-487.

Bulletin No. 5 (p. 6) that the provision, Section 15, defining prohibited acts makes it unlawful for any person to transport or sell in commerce "any goods" in the production of which "any employee" was employed in violation of the minimum wage and overtime provisions. This negatives the idea that nothing is prohibited unless substantial in volume or if the volume is very small or even insignificant the prohibition and the Act does not apply. This would defeat the very purpose of the Act and the effect would be to add further exemption to the statute which is not there. If the Appellate Courts below are correct, then all daily newspapers, except those published in the very large cities, would be exempt, a result never intended by Congress or justified by the statutory language.

This Court, when dealing with cases under the Fair Labor Act, have said nothing to justify the Appellate Division in holding that the doctrine of *de minimis* was applicable.

On the contrary, it has in effect said otherwise.

In *United States* v. *Darby,* 312 U. S. 100, this Court stated (p. 123):

> "Congress, to attain its objective in the suppression of nationwide competition in interstate commerce by goods produced under substandard labor conditions, has made no distinction as to the volume or amount of shipment in the commerce or of production for commerce for any particular shipper or producer. It recognized that in present day indnstry, competition by a small part may affect the whole and that the total effect of the competition of many small producers may be great. See H. Rept. No. 2182, 75th Cong., 1st Sess., p. 7. The legislation aimed at a whole embraces all its parts."

In *Warren-Bradshaw Drilling Company* v. *Hall,* 317 U. S. 88, pages 91, 92, in holding coverage under the Act:

> "The evidence supports the finding that *some of the oil* produced ultimately found its way into interstate commerce." (Italics ours.)

In *Kirschbaum* v. *Walling*, 316 U. S. 517, page 521, it is stated:

> "Congress may choose, as it has chosen frequently in the past, to regulate only part of what it constitutionally can regulate, leaving to the States activities which, *if isolated, are only local.*" (Italics ours.)

Under the facts of this case it can scarcely be said that the respondent isolated itself from the channels of interstate commerce.

This Court when dealing generally with the subject of Interstate Commerce have recently clearly repudiated the narrow and unrealistic view of the Appellate Division.

In *Western Union Telegraph Company* v. *Lenroot*, 323 U. S. 490, 8 WHR 58, the Court stated:

> "It was long ago settled that telegraph lines when extending through different states are instruments of commerce and messages passing over them are a part of commerce itself. *Western Union Telegraph Co.* v. *James*, 162 U. S. 650, 654. That 'ideas, wishes, orders and intelligence' are 'subjects' of the interstate commerce in which telegraph companies engage has also been held. *Western Union Tel. Co.* v. *Pendleton*, 122 U. S. 347, 356; *cf. Associated Press* v. *National Labor Relations Board*, 301 U. S. 103, 128 (1 LRR Man. 732). It is unnecessary to decide whether electric impulses into which the words of the message are transformed are 'goods' within the Act (*cf. Utah Power*

& Light Co. v. *Pfost*, 286 U. S. 165; *Fisher's Blend Station, Inc.* v. *State Tax Commission*, 297 U. S. 650; *Electric Bond & Share Co.* v. *Securities & Exchange Comm.*, 303 U. S. 419), since the complaint is not based on 'shipment' of impulses as 'goods' but only of messages. We think telegraphic messages are clearly 'subjects of commerce' and hence that they are 'goods' under this Act, as alleged in the complaint."

In *United States of America* v. *South-eastern Underwriters*, 322 U. S. 533, at page 549, it is stated:

> "Not only, then, may transactions be commerce though non-commercial; they may be commerce though illegal and sporadic, and though they do not utilize common carriers or concern the flow of anything more tangible than electrons and information. These activities having already been held to constitute interstate commerce, and persons engaged in them therefore having been held subject to federal regulation, * * *."

The Appellate Division was therefore in error in applying the *de minimis* doctrine upon the basis of anything this Court may have said.

They were also in error under the language of the Act, its legislative history and the interpretations of the Wage and Hours Administration in administering the Act.

(2)

Legislative History.

The legislative history also supports the view that Congress intended the Act to apply to newspapers of the size and kind here involved and that the amount of de-

fendant's extrastate distribution was clearly not *de minimis* in the eyes of Congress. In the course of the congressional discussions of the meaning and extent of commerce, Senator Glass propounded the question whether he was engaging in commerce, if he owned a newspaper, for example, of 20,000 subscribers which distributed its entire output in Virginia except for 10 copies sent to extrastate subscribers. Senator Borah, who was suggested as the constitutional authority most qualified to answer, stated as follows:

> "Mr. President, if the Senator is purchasing his goods for the purpose of making up his newspaper in different States and he takes them to a particular place where he uses them, and he transmits his newspapers into other States, I do not think the number—the number, 10 or 20 or 30—is controlling. I think the Senator is engaged in interstate commerce" (83 Cong. Rec., Part 8, p. 9172).

The same opinion was expressed by Mr. Justice Jackson (then Assistant Attorney General) in his testimony before the joint committee of Congress, as evidenced by the following colloquy (Joint Hearings, pt. 1, pp. 81-82):

> "Representative Connery. Now, what about the newspaper business? Would the editorial staff and the printers in the newspaper establishment itself—would they come under this, and how far do these go down?
>
> To the newsboys, or what?
>
> Mr. Jackson: If the newspaper moves in interstate commerce, the persons who were engaged in its production would come under the act.
>
> * * * * *

Representative Connery: Suppose the Boston Post ships up into New Hampshire. They do.

Mr. Jackson: When it crosses the line, it is an act of interstate commerce.

Representative Connery: How would that affect the employees?

Mr. Jackson: That would affect the employees just as any others would be affected by this act.

* * * * *

Representative Connery: But you would say that these Boston Post linotype operators, the men who were engaged in actually getting out the paper, printing the paper, with the machines and all, would be in it?

Mr. Jackson: I think they would."

In view of these expressions of opinion and the specific consideration of the question during the debates, the final adoption of the small newspaper exemption in Section 13 (a) (8) manifests the congressional purpose to cover all such newspapers not exempted by its express terms.

(3)

Expressions of the Wage and Hour Administrator.

In the first Annual Report of the Administrator of the Wage and Hour Division, United States Department of Labor, for the Calendar Year 1939, it is stated (p. 18):

"Where an employee produces any goods for interstate commerce the act makes no distinction as to the percentage of his employer's goods, or of the goods upon which he himself works, that move in interstate commerce. Congress clearly evidenced its intention to bar from interstate commerce all

goods produced in violation of the labor standards prescribed in the act. In section 15 (a) (1) of the act, the 'hot goods' provision, Congress made it unlawful for any person

> (1) To transport or offer for transportation, ship, deliver, or sell in commerce or to ship, deliver, or sell with knowledge that shipment or delivery or sale thereof in commerce is intended, *any goods* in the production of which any employee was employed in violation of section 6 or section 7. (Italics added.)

The phrase 'any goods' clearly shows that the coverage of the act does not depend upon the amount or percentage of the employer's goods, or of the goods upon which the particular employee works, that move in interstate commerce.''

In Interpretative Bulletin *No. 5 (to be submitted to Court), at page 5, it is stated:

> ''9. Where an employee is engaged in the production of any goods for interstate commerce, the act makes no distinction as to the percentage of his employer's goods or of the goods upon which he works that move in interstate commerce. The entire legislative history of the act leads to the conclusion that Congress intended to exclude from the channels of interstate commerce all goods produced under labor conditions detrimental to the

*This Court said as to interpretative bulletins in *United States* v. *American Trucking Association*, 310 U. S. 534, at page 549:

> ''In any case such interpretations are entitled to great weight. This is peculiarly true here where the interpretations involve 'contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new.'''

health, efficiency, and general well-being of workers. The President's message advocating the passage of wage and hour legislation stated that 'goods produced under conditions which do not meet rudimentary standards of decency should be regarded as contraband and ought not to be allowed to pollute the channels of interstate trade.' The Congress expressly found in section 2 (a) (1) that the production of goods under labor conditions detrimental to health, efficiency, and general well-being of workers 'causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several States.' The reference in section 15 (a) (1) to 'any goods' is convincing proof of this intent of Congress to make no distinction as to the percentage of goods which move in interstate commerce. That section makes it unlawful for any person '(1) to transport, offer for transportation, ship, deliver, or sell in commerce, or to ship, deliver, or sell with knowledge that shipment or delivery or sale thereof in commerce is intended, any goods in the production of which *any* employee was employed in violation of section 6 or section 7.'

Thus, there is no justification for determining the applicability of the act to a particular employee on the basis of the percentage of the goods he produces, or of his employer's goods, which move in interstate commerce." (Italics ours.)

In Defendant's Exhibit A, which is a study by the United States Department of Labor, Wage and Hour Division, Economics Branch, entitled "Small Daily News papers under the Fair Labor Standards Act" (June 1942), at page 67, it is stated:

"The Wage and Hour Division has generally held that employees of small newspapers, when not specifically exempted by the language of Section 13(a) (8)of the Act, are covered by the wage and hour provisions of the law if they aid in the flow of interstate commerce to the paper or if they help to produce a paper or job work which goes outside the state or leads to a flow of commerce across state boundaries.[1] This interpretation has been applied to small newspapers as well as large ones, and almost all newspaper employees not specifically exempted have, in short, been held to be covered."

At page 62 of said Study, it is stated:

"*Circulation.*

Small daily papers ship varying, but usually small, percentages of their circulations outside of the state of publication.[2] Information respecting the details of distribution has been obtained in Pennsylvania and from the Iowa Press Association.

The percentage of out-of-state distribution among small dailies in Pennsylvania, including the distribution of unpaid copies to advertisers, varied from less than 0.8 percent. to 9 per cent., as shown in Table 9."

The Wage and Hour Division in investigations also sampled the daily newspapers in Pennsylvania (Study, p. 62) and observed that the circulation of the average small daily newspaper in that state varied from .8% to

1. Wage and Hour Division, press releases, July 14, 1939, and August 13, 1941.

2. The position of the Wage and Hour Division regarding the relation of out-of-state circulation to coverage has been that the percentage of out-of-state shipment is of little importance; that coverage depends on the existence of any shipments rather than upon the extent of shipments.

9%. On a percentage basis the respondent's circulation amounted to about .5% of the number of papers produced. The Study continues (p. 64):

> "While the percentages of out-of-state circulation among small newspapers are very small, they are not materially different from the percentages of out-of-state circulations of the larger papers. All newspapers, regardless of circulation size or the size of the towns or cities in which they are published, are directed at the local reading markets, and the bulk of their circulation is likely to be local."

Nevertheless, the Administrator concluded that the small dailies were covered by the Act.

The respondent's activities meet every test of interstate commerce and coverage under the Act as the survey of the small daily newspapers made by the Wage and Hour Administrator shows.

On pages 55-66 of the above summary, the administrator outlined what he observed as to the interstate characteristics of the small daily newspapers:

A. *General* (page 56) Under this heading the Administrator observed as to small newspapers:

> "Its place in the national economy can very well be regarded as that of an essential agency of communication, at the same time that is a productive enterprise similar to any other factory operation."

B. *Space Content* (page 57).

1. *News.* The Administrator observes that the local news of the small daily newspaper is about 90% and the news from out-of-state sources is about 10%. The re-

spondent had about the same proportion. Most daily newspapers, the Administrator observed, depended for their source of this 10% out-of-state coverage upon either Associated Press, United Press, or International News Service as did the respondent.

2. *Features* (page 60). The small daily newspaper used the same type of syndicated features and mats as the respondent did.

3. *Advertising Mat Services* (page 60). The respondent just as the other small daily newspapers, as the Administrator observed, used advertising mat services and carried national advertising. The national advertising of the respondent was about the same proportion as other daily newspapers of the same size.

C. *Circulation* (page 62).

Since the Court below relied solely upon the amount of extrastate circulation to determine coverage, it is well to quote in full what the Administrator found as to a typical small daily newspaper:

> "C. *Circulation.*
>
> Small daily papers ship varying, but usually small, percentages of their circulations outside of the state of publication.[2] Information respecting the details of distribution has been obtained in Pennsylvania and from the Iowa Press Association.
>
> The percentage of out-of-state distribution among small dailies in Pennsylvania, including the dis-

2. The position of the Wage and Hour Division regarding the relation of out-of-state circulation to coverage has been that the percentage of out-of-state shipment is of litle importance; that coverage depends on the existence of any shipments rather than upon the extent of shipments.

tribution of unpaid copies to advertisers, varied from less than 0.8 per cent. to 9 per cent., as shown in Table 9."

At page 64 of said Study, it is stated:

"While the percentages of out-of-state circulation among small newspapers are very small, they are not materially different from the percentages of out-of-state circulations of the larger papers. All newspapers, regardless of circulation size or the size of the towns or cities in which they are published, are directed at the local reading markets, and the bulk of their circulation is likely to be local."

D. *Materials* (page 64).

The Wage and Hour Administrator also observed that daily newspapers, both large and small, depended upon out-of-state sources for newsprint, ink, type metal and machine parts. The respondent was no exception to this rule.

E. *Summary* (page 66).

"While the point of view and circulation of the small paper are essentially local, the typical small paper has sufficient interstate connections and depends to so large an extent upon the channels of interstate commerce and communication that any picturization of it as a 'strictly local enterprise' is misleading. From the foregoing discussion of the interstate aspects of the operation of small newspapers it is apparent that no newspaper, however local its editorial and advertising policies may be, functions without important reliance upon the ma-

terial resources and intelligence of the world outside the boundaries of its own county and its own state. This is no less true of small newspapers than of large papers, especially in the daily field, where papers of all circulation sizes have come, in recent years, to be more and more alike."

The Appellate Division therefore was not justified in deciding that the "*de minimis*" doctrine applied under the Act.

POINT III.

The doctrine of "de minimis" is inapplicable under the facts and controlling decisions in the Federal Courts which decisions the court below refused to follow.

Even if the "*de minimis*" theory were applicable to cases arising under this Act, that theory could not apply to the case at bar because the out of State activities held insufficient by the Appellate Division were not casual, occasional or isolated acts but formed a part of a daily, continuous practice repeated every day of every week of every year the paper was published.

The Appellate Division applied the doctrine of "*de minimis*" to the law and the facts of the instant case. As we have discussed, *supra*, they did not think that the interstate connections of the respondent or the receipt of cuts and materials from extrastate sources brought the respondent within Interstate Commerce under the act (R. 101). They could not, however, deny that the shipping of the newspapers to other states was an act of Interstate Commerce under the act, but they refused coverage holding this out of state circulation "insignificant" or "inconsequential" or an "inconsequential inci-

dent" and that respondent's "interstate business was not regular but casual; not an integral, but only an incidental part of its essential local business" (R., 99-100). In this assumption they were in error under the law and under the facts.

The Federal Courts, in dealing with newspapers have been unanimous in rejecting the *"de minimis"* doctrine. In the following cases, the facts were strikingly similar to the case at bar. The amount of newspapers sent outside the State was a small portion of the daily production. It was, however, a daily, week in and week out, year in and year out occurrence as happened in the case at bar.

In *Walling* v. *Oklahoma Press Publishing Company, supra,* the District Judge wrote in holding the employees under the Act:

> "Since June 1, 1939, no papers have been sold by the Company to persons outside the State of Oklahoma, unless it might be said that the sending of papers to out-of-state advertisers constitutes a sale, although no sum is paid for the papers as such. The Company mailed, without charge, to former Muskogee residents in the armer forces approximately 120 copies of the Muskogee Daily Phoenix, and approximately 17 copies of the Muskogee Times-Democrat. The Company also mails to its out-of-state representative for advertisers a copy of each paper for each foreign advertiser. The number of papers so sent is approximately 67 daily."

In *Sun Publishing Company* v. *Walling, supra,* the Circuit Court said where 200 copies out of 9,000 were sold outside the state:

"Likewise it is unimportant that only a small percentage of appellant's newspapers are sent out of the state. *U. S.* v. *Darby*, 312 U. S. 100 (1 WH cases 17); *Chapman* v. *Home Ice Co.*, 136 F. 2d 353 (6 WHR 570) (C. C. A. 6). The Act, by its terms, is applicable to newspapers generally because by its express terms it exempts weeklies and semi-weeklies and those with circulations less than 3,000."

In *Fleming* v. *Lowell, supra*, the District Judge observed:

"The respondent contends, in resisting the order sought, that the Administrator is without jurisdiction over the respondent's affairs because of the infinitesimal amount of respondent's circulation that crosses the state lines.

"In support of this contention the respondent argues that more than 98% of its total average daily circulation is distributed entirely within the Commonwealth of Massachusetts. To be sure, the Congress in passing the Act was exercising its power to regulate commerce to correct and eliminate the conditions referred to in its findings set out in Section 2 (a) of the Act. However, the percentage or number of newspapers of the respondent that crossed state lines is not controlling on the question of whether or not the respondent is engaged in commerce between the states."

The Appellate Division below sought to distinguish this case by stating (R., p. 560):

"Respondents also rely on *Fleming* v. *Lowell Sun Co.* (36 F. Supp. 329; reversed on other grounds,

120 F. 2d 213, and affd. by an equally divided court, 315 U. S. 784). That case, so far as material, is authority only for the proposition that a large newspaper is engaged in interstate commerce. (See *Schroepfer* v. *A. S. Abell Co., supra,* p. 115.)"

The Wage and Hour Administrator has expressly denied any such distinction. Defendant's Exhibit A, at page 67.

The Appellate Division in invoking the *"de minimis"* doctrine did so on the authority of *National Labor Relations Board* v. *Feinblatt, supra,* heretofore discussed and *Zehring* v. *Brown Material Co.,* 48 F. Supp. 740 (S. D. Calif.) and *Goldberg* v. *Worman,* 37 F. Supp. 778 (D. C. Fla.).

The latter two cases, besides being contrary to the overwhelming weight of authority in the Federal Courts are clearly distinguishable under their facts. For instance in *Goldberg* v. *Worman,* the extra state shipments were "a matter of accommodation." While in the *Zehring* case, the employees in question were repairmen held not engaged in Interstate Commerce and the employer was held exempt as a retail establishment. Neither of these cases were "newspaper" cases.

Furthermore, in the *Goldberg* case the employee was in the exempt category since the employer was a "retail" establishment and the employee's "greater part of * * * selling (was) in interstate commerce (Act Sec. 13 [a] 2)."

The following cases, though not newspaper cases discussed and rejected the *"de minimis"* theory.

McKeown v. *Southern California,* 52 Fed. Supp. 331, 6 WHR 1016, affd. April 21, 1945, 8 WHR 482, 148 Fed. 2nd 891;

In Ling, et al. v. *Currier Lumber Co.,* 6 WHR 401, 50 Fed. Supp. 204;

Drake v. *Hirsch*, 40 Fed. Sup. 290, 1 WHC 702, U. S. D. C. N. D. Georgia;

Muldowney v. *Seaberg Elevator Co.*, 39 Fed. Supp. 275, 1 WHC 605, U. S. D. C. E. D. New York;

Nelson v. *Southern Ice Co.*, U. S. D. C. N. D. Texas, 1 WHC 787;

Strand v. *Garden Valley Telephone Co.*, 6 WHR 1087, U. S. D. C. District of Minnesota;

Elmore v. *Cromer & Beaty Co., Inc.*, 6 WHR 861, U. S. D. C. W. D. South Carolina, August 2, 1943;

Philips v. *Star Overall Dry Cleaning Co.*, 7 WHR 92, U. S. D. C. S. D. New York, January 6, 1944;

Dorner v. *Iaco Clothes, Inc.*, 7 WHR 35, U. S. D. C. N. D. Illinois;

Walling, etc. v. *Partee, et al.*, 6 WHR 863, U. S. D. C. Tennessee;

Walling v. *Oklahoma*, 7 WHR 655, U. S. D. C. E. D. Oklahoma;

Wood v. *Central Sand & Gravel Co.*, 33 Fed. Supp. 40, 1 WHC 326;

Chapman v. *Home Ice Co.*, 136 Fed. 2d 353 (CCA 6), cert. den. 320 U. S. 761;

Schmidt v. *The Peoples Telephone Union of Maryland*, 138 Fed. 2d 13 (CCA 8);

Davis v. *The Goodman Lumber Co.*, 133 Fed. 2d 52 (CCA 4).

We are just referring to two of them since they seem to illustrate the principle for which we are contending that distinguishes the case at bar from the isolated minority view of the Appellate Division.

In *Ling* v. *Currier Lumber Co.*, *supra*, the District Judge presiding, in referring to *United States* v. *Darby*,

supra, wherein this Court noted that Congress "has made no distinction as to the volume or amount of shipments," stated (p. 208):

> "Therein lies the distinction and in our opinion it is now generally accepted that when even less than one per cent of one's business is in interstate commerce, that business is subject to the Fair Labor Standards Act, unless that 'less than one per cent' was a casual or isolated sale."

Also District Judge J. T. O'Connor in *McKeown* v. *Southern California*, 52 Fed. Supp. 331, affd. 148 Fed. 2nd 891, 6 WHR 1016, in refusing to apply the "*de minimis*" doctrine under the Act where the interstate activity, as small as it might be, was a regular every-day and every-week occurrence and not casual or spasmodic, stated (p. 333):

> "The activities of the plaintiff, under the facts, were not casual nor spasmodic, but rather a continuous, regular and integral part of his everyday and every week business, partaking of an interstate character. Withholding recognition of these salient factors would be interpolating language into the Act which was not intended by Congress nor observed by the cases construing the statute. It is the opinion of this court that the rule *de minimis* is not applicable in view of the decisions cited and the stipulation submitted."

Also at page 331:

> "An examination of the Act negatives any delimination upon the percentage of the employee's activities in order to preclude or avail himself of its benefits."

This Court had an opportunity to approve the invoking of the doctrine of "*de minimis*" when the daily newspaper publisher in *Sun Publishing Co.* v. *Walling*, 140 Fed. 2nd 445, applied for certiorari, denying coverage under the Act under such doctrine and urging the authorities relied upon by the Appellate Division and included the case at bar then before the New York Court of Appeals (see petition of Sun Publishing Co., pp. 22 to 24 dated March 18, 1944). This court denied certiorari, 322 U. S. 728.

The doctrine that each State Court could fix the amount and type of commerce requisite before there would be coverage under the Act would defeat the very purpose of Congress to insure that the Act would have the broadest coverage and reach the farthest channels of commerce. The result would be that each of the 48 State Courts, under the guise of the "*de minimis*" doctrine, would set the standard as to how much and what kind of commerce was necessary to be present in its state before the Federal Act could apply. Employers would be tempted to split up their units and by keeping within the prescribed minimum range of activity could escape coverage of the Act and thereby deny the employees the benefit of it. This doctrine, if permitted to stand, would have the effect of excluding virtually all the employees of all small daily newspapers throughout the country and probably many other groups of labor not now under consideration.

To permit each of the State Courts to determine the coverage of a Federal statute upon the theories relied upon in the New York Appellate Courts below, is a dangerous precedent and one that would in all probability lead to the escape in the aggregate of large groups of concerns whose employees the Congress intended to be benefited by the Act.

Conclusion.

The judgment of the New York Court of Appeals should be reversed and the recoveries obtained by the petitioners at Trial Term should be ordered reinstated with costs, interest and reasonable counsel fees* for services rendered before the Appellate Division, Court of Appeals and this Court.

Respectfully submitted,

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*The Trial Court awarded $1,000.00 counsel fees (R. 23). Under the Act (Sec. 16 [b]), and *Greenberg, etc.* v. *Arsenal Building Corp.*, 144 Fed. 2nd 292, the Appellate Court may award additional fees for services rendered in reviewing a judgment appealed from.

APPENDIX.

FINDING AND DECLARATION OF POLICY.

SEC. 2. (a) The Congress hereby finds that the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several States; (2) burdens commerce and the free flow of goods in commerce; (3) constitutes an unfair method of competition in commerce; (4) years to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and (5) interferes with the orderly and fair marketing of goods in commerce.

(b) It is hereby declared to be the policy of this Act, through the exercise by Congress of its power to regulate commerce among the several States, to correct and as rapidly as practicable to eliminate the conditions above referred to in such industries without substantially curtaining employment or earning power.

DEFINITIONS.

SEC. 3. As used in this Act—

* * * * *

(b) "Commerce" means trade, commerce, transportation, transmission, or communication among the several States or from any State to any place outside thereof.

* * * * *

(i) "Goods" means goods (including ships and marine equipment), wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof, but does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof.

(j) "Produced" means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof, in any State.

* * * * *

EXEMPTIONS.

SEC. 13. (a) The provisions of sections 6 and 7 shall not apply with respect to (1) any employee employed in a *bona fide* executive, administrative, professional, or local retailing capacity, or in the capacity of outside salesman (as such terms are defined and delimited by regulations of the Administrator); or (2) any employee engaged in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce; or (3) any employee employed as a seaman; or (4) any employee of a carrier by air subject to the provisions of title II of the Railway Labor Act; or (5) any employee employed in the matching, taking, harvesting, cultivating, or farming of any of fish, shellfish, crustacea, sponges, seaweeds, or other aquatic forms of naimal and vegetable life, including the going to and returning from work and including employment in the loading, unloading, or packing of such products for shipment or in propagating,

processing, marketing, freezing, canning, curing, storing, or distributing the above products or byproducts thereof; or (6) any employee employed in agriculture; or (7) any employee to the extent that such employee is exempted by regulations or orders of the Administrator issued under section 14; or (8) any employee employed in connection with the publication of any weekly or semiweekly newspaper with a circulation of less than three thousand the major part of which circulation is within the county where printed and published; or (9) any employee of a street, suburban, or interurban electric railway, or local trolley or motor bus carrier, not included in other exemptions contained in this section; or (10) to any individual employed within the area of production (as defined by the Administrator), engaged in handling, packing, storing, ginning, compressing, pasteurizing, drying, preparing in their raw or natural state, or canning of agricultural or horticultural commodities for market, or in making cheese or butter or other dairy products; or (11) any switchboard operator employed in a public telephone exchange which has less than five hundred stations.[1]

* * * * * *

PROHIBITED ACTS.

SEC. 15. (a) After the expiration of one hundred and twenty days from the date of enactment of this Act, it shall be unlawful for any person—

(1) to transport, offer for transportation, ship, deliver, or sell in commerce, or to ship, deliver, or sell with knowledge that shipment or delivery or sale thereof in commerce is intended, any goods

in the production of which any employee was employed in violation of section 6 or section 7, or in vilation of any

1. Amendment provided by Act of August 9, 1939 (Public No. 344, 76th Congress. 53 Stat. 1266).

regulation or order of the Administrator issued under section 14; except that no provision of this Act shall impose any liability upon any common carrier for the transportation in commerce in the regular course of its business of any goods not produced by such common carriers, and no provision of this Act shall excuse any common carrier from its obligation to accept any goods for transportation;

* * * * *

PENALTIES.

SEC. 16. (a) Any person who wilfully violates any of the provisions of section 15 shall upon conviction thereof be subject to a fine of not more than $10,000, or to imprisonment for not more than six months, or both. No person shall be imprisoned under this subsection except for an offense committed after the conviction of such person for a prior offense under this subsection.

(b) Any employer who violates the provisions of section 6 or section 7 of this Act shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated, or such employee or employees may desigante an agent or representative to maintain such action for and in behalf of all employees similarly situated. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action.

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